
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: May 15, 1995
CASE NOS. 91-ERA-47
91-ERA-49

IN THE MATTER OF
BONNIE R. COLLINS,
and
EDWARD S. WOLLESEN,
COMPLAINANTS,

v.

FLORIDA POWER CORPORATION,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988) (the ERA). [1] Complainants Bonnie R. Collins and Edward S. Wollesen alleged that they were fired by Respondent Florida Power Corporation (Florida Power) in retaliation for engaging in activity protected by the ERA. Following a lengthy hearing on the merits, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.D. and O.) dismissing the case. After careful analysis of the R.D. and O., the record, and the briefs filed before me, I concur with the ALJ's determination and dismiss the case.

BACKGROUND

Edward S. Wollesen was employed by Florida Power for over ten years, and Bonnie R. Collins was employed at Florida Power for over 11 years, prior to May 10, 1991. R.D. and O. at 53. Wollesen's office was at Crystal River 3 (CR3), a nuclear power generating unit, some 14 miles from the Training Center where Collins worked as a nuclear training clerk. *Id*. Because of the nature of Wollesen's work as a senior nuclear quality assurance specialist, [2] on many occasions he participated in activities that could reasonably be

---

[PAGE 2]
considered to be protected under the Act. Thus, for example, in 1988 he participated in a surveillance to identify instruments at CR3 which were not being calibrated correctly. *Id*. at 3.

In November 1990 the surveillance group in which Wollesen worked was merged with Florida Power's auditing group. *Id*. In Florida Power parlance, Wollesen became a "displaced person." *Id*. at 63. Florida Power offered Wollesen a position as an electrician, at a significant cut in pay. *Id*. However, as a result of written and oral communications between Wollesen and his Florida Power supervisors, Wollesen was retained in the merged department on a temporary basis as a senior quality auditor, and was placed in a permanent position as soon as an opening occurred. *Id*. at 63. Between November 1990 and May 10, 1991, Wollesen, as well as other members of the newly combined unit, performed both audit and surveillance work at CR3.

Starting in the fall of 1990 Bonnie Collins became engaged in a business called "The Pleasure Company," a pyramid sales enterprise in which attendees at parties placed orders from the Pleasure Company catalogue. The Pleasure Company's line of products ranged from lingerie to a variety of sexual devises, lotions, and how-to books. Respondent's Exhibit (RX) 4. Although Collins held Pleasure Company parties on her own time and outside of the Florida Power facility, she prepared several Pleasure Company related materials on her personal computer at work. *Id*. at 11.

Wollesen had for some time engaged in a variety of businesses in addition to his position with Florida Power. *Id*. at 4, 57. At various times he and his wife sold

birds, dogs, and horses. *Id.* at 4. He sold shoes and pool chlorinator equipment.
Id. He was involved in car sales, marketing advertising services, and he was a notary
public. *Id.* at 4-5. He also sold prepaid legal insurance. *Id.* at 4. In April
1991 he became involved with the Pleasure Company through Collins. *Id.* at 6.
Wollesen also became romantically involved with Collins. *Id.* at 6, T. 113.

In early May 1991 Florida Power officials learned of Wollesen's and Collins'
association with the Pleasure Company, and were presented with evidence which indicated
that Wollesen and Collins had been engaging in Pleasure company business during Florida
Power business hours and using Florida Power equipment. *See, e.g., Id.* at 24-25. On
the morning of May 10, 1991, Collins was interviewed by Florida Power security investigator
John Pelham and was then informed by her second level supervisor, Larry Kelly, that she was
being dismissed for violating Florida Power's written policy against engaging in a for-profit
business on Florida Power property, and Florida Power time, using Florida Power equipment.
Id. at 12. Wollesen was interviewed by the same security investigator later on May
10, and was then informed that he, too, was being dismissed for engaging in a for-profit
business on Florida Power property and time and using Florida Power equipment. *Id.*
at 7. Collins and Wollesen then filed timely complaints of retaliation against Florida Power,
and this case ensued.

THE ALJ'S RECOMMENDED DECISION

The ALJ wrote a copious recommended decision, including a 53-page summary of the

---

[PAGE 3]
evidence presented. [3] Based upon that evidence he concluded that:

> * Collins did not prove that she had engaged in protected activity. R.D. and O. at 55-56.

> *Therefore, the only theory upon which Collins could prevail was that Florida Power retaliated against Wollesen for engaging in protected activity, and fired Collins in order to mask its true motive for firing Wollesen. *Id.* at 56.

*Wollesen had proved that he had engaged in protected activity, Florida Power knew it, and took adverse action against him. *Id*. at 55.

*However, Wollesen failed to prove that his protected activity was the likely cause of Florida Power's adverse action. *Id*. at 56-63. [4]

*Because Collins, claim "rises or falls depending on the merits of Wollesen's claim," Collins also did not prove retaliation. *Id*. at 56.

Accordingly the ALJ dismissed the case.

DISCUSSION

The Complainants failed to prove, by a preponderance of the evidence in the record as a whole, that they were retaliated against for activity protected by the ERA.

A. Evidence Regarding Wollesen.

The ALJ found that Wollesen had engaged in protected activity within the meaning of the ERA. That finding is amply supported by the evidence. First, Wollesen's positions, as a senior nuclear quality assurance specialist and a quality auditor, were precisely the kind that lead to daily actions that could constitute protected activity. Both the surveillance and the audit functions involve evaluating the quality of procedures and processes in the nuclear power plant. As the Ninth Circuit noted in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (1984), employees engaged in this type of quality control work in a nuclear power generation facility are precisely the people that the ERA whistleblower provision is designed to protect.

Second, Wollesen testified regarding some specific activities which could be considered to be protected. For example, in 1988 Wollesen expressed concerns regarding the methods Florida Power was using to ensure that instruments were calibrated in a timely manner. R.D. and O. at 3.

Third, for reasons that are not made clear in the record of this case, a Nuclear Regulatory Commission (NRC) investigator interviewed Wollesen the day before he was terminated. R.D. and O. at 2, 6, 55. Wollesen reported this contact to his supervisor, Ray Yost, immediately before he was interviewed by security investigator Pelham and asked Yost

what he should do about future contacts. R.D. and O. at 7, 32, 55. The NRC communication

---

[PAGE 4]
clearly is protected activity, and it occurred and was communicated to Florida Power officials immediately before Wollesen was terminated. Thus, there is no dispute that Wollesen engaged in protected activity.

However, the evidence is overwhelming that Wollesen was terminated not because of activity protected by the ERA, but because Florida Power believed that he had engaged in a potentially embarrassing for-profit business using company equipment and time. A recitation of the events leading up to Wollesen's termination will place this issue in its proper context.

Bonnie Collins became a Pleasure Company distributer in the fall of 1990. *Id.* at 38. Wollesen learned of the Pleasure Company through Collins, and in April 1991 Wollesen also became a Pleasure Company distributor. *Id.* at 6. Prior to his termination he had set up one Pleasure Company party. *Id.*

Also in April 1991 Bernie Komara (an instructor at the Florida Power Training Center where Collins worked) reported to Ken Yost, Wollesen's supervisor, that Wollesen was spending lots of time at the Training Center in the early morning, and was leaving with large amounts of documents. *Id.* at 31. In the meantime, Bruce Hickle, Director of Quality Programs and Wollesen's third level supervisor, received the same information. Hickle did two things with this information. First, he informed Training Center Director Larry Kelly that Wollesen was spending time at the Training Center early in the morning and was removing documents, that Wollesen was not engaged in audit work relating to the Training Center, and that Wollesen would be told to stop going to the Training Center. *Id.* at 24, 37. Second, Hickle asked Yost to find out what Wollesen was doing at the Training Center, and to tell Wollesen that if his visits were not related to official business, to stop going to the Training Center.[5] *Id.* at 24. Yost told Wollesen not to go to the Training Center unless he had some stated business at that facility. *Id.* at 31.

Around this time Yost had another meeting with Wollesen. Yost had been told by

Hickle and by one of his subordinates, Jeffrey Peet, that Wollesen had been engaging in a variety of outside business activities on company time. *Id*. Yost questioned Wollesen about these activities, and although Wollesen mentioned some of his business activities to Yost, he did not mention his involvement in the Pleasure Company. *Id*. Yost stated in a contemporaneous memorandum that he told Wollesen that outside business activity was prohibited, and if it continued Wollesen could face termination. Id; Complainant's Exhibit (CX) 29 at 3.[6]

In the meantime Larry Kelly became concerned that Wollesen might be removing lesson plans from the Training Center to sell to other utilities. *Id*. at 40. Therefore, on May 2 he asked Terry Kamann, Collins, immediate supervisor, to find out from Collins what Wollesen was removing from the Training Center. *Id*. at 37. Collins was the logical person to ask because she worked in the Training Center library and was in charge of the electronic masters of all lesson plans. *Id*. at 9. Kamann reported back to Kelly that Wollesen had only removed one or two lesson plans. *Id*. at 37.

However, Kelly spoke to Bernie Komara, who stated that he had seen Wollesen carrying away more materials than just a few lesson plans. *Id*. Because of the inconsistency

---

between Collins, statement (as reported by Kamann) and what he was told by Komara, Kelly decided to ask Florida Power's security department to investigate. *Id*. at 37, 70. [7] Thus, on the morning of May 7 Kelly met with security official John Pelham and told him that Wollesen had been seen removing papers from the Training Center on numerous occasions. *Id*.

Komara evidently gave Kelly another bit of information; he disclosed that he had seen evidence that a lot of electronic mail had been going back and forth between Wollesen and Collins. *Id*. At Kelly's request, Michael Pombier, the operator of the Training Center's electronic mail network retrieved from the system a message from Wollesen to Collins. Id; RX 9b, p. 34. Attached to that message was a list of Pleasure Company products. *Id*.; RX 9b, p. 35. Kelly concluded from these documents that Collins and Wollesen

were in business together. R.D. and O. at 37. After Collins had left for the day Pombier, at Kelly's direction, found a computer disk at Collins, work station which contained Pleasure Company materials. *Id.* at 37, 70. Kelly copied the materials and gave the information to Pelham that day. *Id.*

Based on the added information received from Kelly, Pelham and Pombier went to Wollesen's work area at CR3. Pelham opened a locked file cabinet and retrieved copies of electronic mail correspondence between Wollesen and Collins. *Id.* at 41, 44, 47.

On May 9 Pelham had a meeting with Hickle and Kelly at which he displayed the electronic mail traffic between Wollesen and Collins, copies of the Pleasure Company documents Pelham had found on Collins, computer disk, and a Pleasure Company catalogue which had evidently been sent by Collins through Florida Power's interoffice mail system to the roommate of Pelham's secretary. *Id.* at 24-25, 41, 45. Late in the day on May 9 Hickle and Kelly met with Jim DeLonzo, manager of Florida Power's human resources department. Kelly and Hickle explained the information they had regarding Wollesen's and Collins' Pleasure Company business activities and asked whether these activities could be deemed a dischargeable offense. *Id.* at 25-26. DeLonzo checked with the Vice President in charge of human resources and then assured Hickle and Kelly that Wollesen's and Collins, activities, as represented by the materials obtained, would constitute a dismissable offense under two company policies: conflict of interest and misuse of company micro-computers. *Id.* at 26.

Early on May 10, Hickle and Pelham met with Wollesen's immediate supervisor, Ray Yost, and showed him the evidence that had been gathered regarding the Pleasure Company business. *Id.* at 32. Later that day Yost sat in on an interview between Pelham and Wollesen, at which Wollesen admitted using the company electronic mail system to discuss Pleasure Company business with Collins, and admitted sending one Pleasure Company form over the electronic mail system. RX 14 at 20. Yost and Pelham then met with Hickle. They summarized the interview with Wollesen, and Yost recommended to Hickle that Wollesen be discharged because he had used company property, engaged in business activities on company

time, and had not been forthright and honest with Yost regarding his business activities at their May 3 meeting. R.D. and O. at 32. Hickle then spoke with Senior Vice President for Nuclear Operations, Percy Beard, Jr. He described the interview with Wollesen and recommended that Wollesen be terminated. *Id*. at 26. Beard concurred, and Hickle informed Wollesen that he was being terminated. *Id*.

[PAGE 6]

There is no reason to conclude, based upon the facts recited here, that Wollesen was terminated in retaliation for his protected activities. First, if Florida Power had wanted to terminate Wollesen in retaliation for any protected activity, the company passed up several good opportunities to do so. Thus, for example, when Florida Power merged the surveillance and audit functions, Wollesen's position was "displaced.,, Presumably he could have been laid off at that point, or placed in a position in which he could not have a daily impact on safety related issues. Florida Power took neither of these actions, however. Instead, it retained Wollesen over its budgeted positions in the newly merged unit until a vacancy occurred in April 1991, and then placed Wollesen in that position. *Id*. at 22, 30. The record supports the conclusion that far from being a thorn in Florida Power's side, in the month immediately prior to his discharge, Wollesen was a valued employee of Florida Power.

Second, it is clear that Wollesen violated at least one company policy. The Company Policy Manual policy on security states in pertinent part:

> Florida Power microcomputers may . . . be used for limited nonbusiness usage if certain conditions are met: usage must be **after** regular business hours, only for **non-profit-making** situations, and the employee's non-business related files or programs must be maintained on personally-owned diskettes.

RX 8 at 5. Emphasis in original. Wollesen conceded that he had used his computer for Pleasure Company business. He asserted that he only worked on Pleasure Company business outside of business hours; however, the ALJ did not credit that testimony. R.D. and O. at 57. In any event Florida Power's policy applied to any for-profit work. And, although

Complainants argued that Florida Power should have employed the company's progressive discipline policy rather than terminating them, there is nothing in the record to support a conclusion that Florida Power failed to apply progressive discipline for illicit reasons. As the ALJ aptly noted, Florida Power was entitled to fire the Complainants for good reasons, bad reasons, or no reason, "as long as it's not a discriminatory reason." Transcript at 525.

Third, although Complainants attempted to establish that Wollesen was treated more severely than other employees who conducted outside businesses on company time, there is significant evidence in the record to distinguish the Pleasure company business from the other businesses described. Briefly, there was testimony that the following businesses were carried on at Florida Power without disciplinary action being taken: Avon products were sold and distributed (R.D. and O. at 5, 9); Tupperware products were distributed (*Id.* at 9); one employee occasionally sold burritos (*Id.* at 9, 10); another employee sold silk flowers (*Id.* at 10); and one employee sold chicken dinners for his church (*Id.*). There was also testimony that supervisor Kamann and his wife owned a gift shop, and that Kamann on occasion displayed crafts for sale in his office. *Id.* at 10, 17. Some of these business activities (Avon, Tupperware, Kamann's crafts) would appear to be comparable to the Pleasure Company business, and might raise the suspicion that Wollesen was disciplined for his protected activity and not for engaging in a for-profit business at Florida Power. However, the supervisors who took action against Wollesen testified that they did not know of these other business activities. R.D. and O. at 27 (Hickle), 40-41 (Kelly), [8]20 (Beard). The ALJ explicitly credited that testimony (R.D. and O. at 61-63), and so do I.

More importantly, however, it is absolutely clear that Florida Power officials thought that the Pleasure Company business was different in character than the other businesses mentioned. Thus, Hickle testified that he felt that the nature of the business might lead to a perception that Florida Power condoned a hostile working environment. *Id.* at 25, 29.

Hickle and Yost both felt that Wollesen had not been honest in discussing his outside activities with Yost on May 3. *Id*. 27, 32. Beard thought that the nature of the Pleasure Company was an aggravating factor, and that disclosure that company employees were engaged in the business of selling sexual devices would reflect discredit on his division. *Id*. at 19-20. Kelly, who was Collins, supervisor, felt that the nature of the Pleasure Company business was an embarrassment to Florida Power. *Id*. at 38, 63. The ALJ correctly concluded, based upon this credible evidence, that "Wollesen . . . failed to show that the individuals responsible for the decision that he be terminated discriminated against him by allowing others to operate private, for-profit businesses on FPC property with immunity, while firing Wollesen for the same activity." *Id*. at 63.

B. Evidence Regarding Collins.

There is no credible evidence that Collins engaged in activity protected under the ERA. See R.D. and O. at 55-56. Thus, the only possible theory upon which she could prevail is that Florida Power retaliatorily discharged Wollesen and discharged Collins at the same time in an effort to obscure its motives. As discussed above, Wollesen was not retaliated against for engaging in protected activity. Thus, Collins' claim must fail.

CONCLUSION

The fact that Florida Power officials reacted in a decisive and unforgiving manner to the evidence that Wollesen and Collins had conducted some Pleasure Company related business on Florida Power property and with Florida Power resources does not make the termination actionable under the ERA. The ERA does not protect workers even from unreasonable or arbitrary actions on the part of an employer. The ERA only protects workers from actions taken in retaliation for engaging in activities protected by the ERA. The Complainants failed to prove that Florida Power engaged in retaliatory conduct. Therefore, I agree with the ALJ's decision and dismiss the case.

SO ORDERED.

ROBERT B. REICH

Secretary of Labor

Washington, D.C.

[ENDNOTES]

[PAGE 8]

[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaint was filed prior to the effective date of the Act. For simplicity's sake I will continue to refer to the ERA whistleblower provision as codified in 1988.

[2] A quality assurance specialist verifies, within a narrowly defined scope, compliance with nuclear quality and safety requirements. R.D. and O. at 16.

[3] The ALJ's summary of the evidence is accurate. Therefore factual citations are usually to the R.D. and O.

[4] The ALJ concluded that "Wollesen has failed to establish a prima facie case since it was most unlikely that he was fired because of this protected activity." R.D. and O. at 73. However, it is clear from other language in the R.D. and O. that the ALJ did not base his decision on a finding that Wollesen had not established a *prima facie* case. Rather, the ALJ held that Wollesen had not proved by a preponderance of the evidence that he was retaliated against because he engaged in protected activity. Therefore, there is no need to discuss whether Wollesen overcame the minimal burden of presenting a *prima facie* case. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec. and Ord., Feb. 15, 1995, slip op. at 11, *appeal pending*, Docket No. 95-1729 (8th Cir.).

[5] There was evidence that Wollesen was preparing an article for a journal, and was using some work plans from the Training Center to prepare that article. R.D. and O. at 34. However, there was no evidence presented that any Florida Power supervisors other than Ray Yost were aware that he might have had a legitimate reason for removing documents from the Training Center at the time that they began to investigate Wollesen's activities.

[6] Wollesen testified that he did not remember Yost's warning, however, the ALJ explicitly credited Yost's version of this meeting. *Id*. at 62. The record fully supports the ALJ's determination in this regard.

[7] The ALJ found:

> Because Collins' statement as to the volume of material being removed varied considerably with what Hickle had reported, Kelly questioned Bernie Komara, a training instructor at the Training Center . . . . Having received conflicting reports, Kelly requested corporate security to conduct an investigation to identify the materials removed by Wollesen and to determine for what purpose they were removed . . . .

R.D. and O. at 70. Citations omitted. These findings are amply supported by the record.

[8] Kelly testified that he did know that Kamann had brought in some flower arrangements once and had placed them in the Training Center lobby with his gift shop's card on them. R.D. and O. at 39-40, 62-63. However, Kelly immediately asked Kamann to remove the arrangements and told Kamann that it wasn't appropriate. *Id*. at 39.